2004

State of Utah v. Daniel Perez-Avila : Brief of Appellee

Utah Court of Appeals

IN THE UTAH UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DANIEL PEREZ-AVILA, Defendant/Appellant.	Case No. 20040174-CA

BRIEF OF APPELLEE

AN APPEAL FROM CONVICTIONS FOR TWO COUNTS OF AUTOMOBILE HOMICIDE, SECOND DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-5-207 (Supp. 2002); ONE COUNT OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (Supp. 2002); TWO COUNTS OF CHILD ABUSE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-5-109 (Supp. 2000); AND ONE COUNT OF POSSESSING AN OPEN CONTAINER OF ALCOHOL IN A VEHICLE, A CLASS C MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 41-6-44.20 (Supp. 2002), IN THE FIFTH JUDICIAL DISTRICT COURT, WASHINGTON COUNTY, UTAH, THE HONORABLE JAMES L. SHUMATE PRESIDING

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ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **DANIEL PEREZ-AVILA,** **Defendant/Appellant.**	**Case No. 20040174-CA**

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from convictions for two counts of automobile homicide, second degree felonies, in violation of Utah Code Ann. § 76-5-207 (Supp. 2002); one count of driving under the influence of alcohol, a third degree felony, in violation of Utah Code Ann. § 41-6-44 (Supp. 2002); two counts of child abuse, a class A misdemeanor, in violation of Utah Code Ann. § 76-5-109 (Supp. 2000); and one count of possessing an open container of alcohol in a vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6-44.20 (supp. 2002). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUES

1. Was defense counsel ineffective for not filing a motion to suppress a warrantless blood draw, where defendant was unconscious when his blood was drawn, and under Utah's implied consent statute an unconscious person is considered to have consented?

2. Was defense counsel ineffective for not asking the trial court to merge defendant's DUI conviction with his automobile homicide conviction, where automobile homicide is an enhancement statute that the legislature did not intend to merge with a DUI conviction?

Standard of Review. These issues are raised for the first time on appeal. Thus, no standard of review applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following relevant statutes are attached as Addendum:

Utah Code Ann. § 41-6-44 (Supp. 2002)
Utah Code Ann. § 41-6-44.10 (Supp. 2002)
Utah Code Ann. § 76-1-402 (West 2004)
Utah Code Ann. § 76-5-206 (West 2004)
Utah Code Ann. § 76-5-207 (Supp. 2002)

STATEMENT OF THE CASE

The State charged defendant with two counts of automobile homicide, one count of driving under the influence of alcohol, two counts of child abuse, one count of possession of a controlled substance, and one count of possession of an open container of alcohol in a vehicle (R. 1–2, 25–26). After a preliminary hearing, the trial court bound defendant over on all counts except the charge of possession of a controlled substance, which it dismissed (R.

29–30, 37–38; 226:45). A jury convicted defendant as charged (R. 170–73, 191–94; 229:360–61). The court sentenced defendant to consecutive prison terms of one to fifteen years for the two automobile homicide counts, one concurrent prison term of zero to five years for driving under the influence of alcohol, and two consecutive one-year jail terms for the child abuse counts (R. 204–08, 210–14). Defendant filed a timely notice of appeal (R. 209).

STATEMENT OF FACTS

On May 26, 2002, defendant rolled his pickup truck on I-15 near Leeds, Utah (R. 228:58, 61). The pickup's occupants—defendant, defendant's pregnant wife, and their two children—were ejected from the vehicle (R. 228:58). Defendant's wife and unborn child were killed, and his children were seriously injured (R. 228:60, 131, 151). A sample of defendant's blood taken shortly after the accident contained .24 grams of alcohol per 100 milliliters of blood—three times the legal limit (R. 228:116).

Witnesses saw defendant drinking and driving erratically before the accident. A cashier at a truck stop in Parowan, approximately an hour north of the crash site, testified that defendant had stopped and tried to buy $20 in gasoline (R. 228:85). She smelled a very strong odor of alcohol coming from defendant (R. 228:86). Defendant was angry and argumentative because he was having trouble pumping his gas (R. 228:85–86). He ultimately drove off without buying any gas (R. 228:86). The cashier wrote down defendant's license plate and called police (R. 228:87–89; State's Ex. No. 10, track 4).

A truck driver, Shaine Dunkle, saw defendant pulling into a rest area just south of Cedar City (R. 228:57). Defendant stopped suddenly and threw his pickup into reverse,

nearly hitting the car the behind him (R. 228:57). Defendant got back on the freeway and followed Dunkle for a few minutes before passing him "like [Dunkle] was sitting on blocks" (R. 228:57). A couple of miles further down the road, Dunkle passed defendant's pickup sitting by the side of the road (R. 228:57). Defendant began following Dunkle again (R. 228:57). He then passed Dunkle and two other eighteen-wheelers by driving on the rumble strip in the far left shoulder (R. 228:57). Dunkle noticed that defendant was drinking from an open aluminum can between his legs and was having trouble keeping his pickup truck "between the lines" (R. 228:58, 61).

After a couple of more miles, Dunkle saw defendant drift onto the dirt on the right shoulder (R. 228:58). When defendant tried to get back on the highway, he apparently over-steered, and the pickup truck rolled (R. 228:58). Dunkle saw defendant's two children fly out of the truck (R. 228:58). He also saw a "whole lot of cans and stuff going flying everywhere" (R. 228:58). Dunkle used his truck to block off the road and protect the two children, who lay bleeding in the middle of the freeway (R. 228:59). He then called 9-1-1 and reported the accident (R. 228:60).

Washington County Sheriff's deputies and Utah Highway Patrol troopers arrived within minutes (R. 228:98, 151, 176). Medical personnel also arrived and transported defendant and his children to the Dixie Regional Medical Center (R. 228:151, 159, 185). Defendant's wife was dead at the scene (R. 228:151). Police observed approximately a twelve-pack of beer cans strewn about (R. 228:153; State's Ex. Nos. 6–9). Some were opened and at least one was cold and half-full (226:18, 20). The supervising officer asked

Trooper Shawn Hinton to go to Dixie Regional and supervise a blood draw from defendant (R. 228:185–86).

At Dixie Regional, Trooper Hinton obtained defendant's identification (R. 228:190). Defendant and his children were the only trauma victims in the hospital (R. 228:192). Trooper Hinton gave a blood draw kit to Joanne Nielson, an emergency room nurse, and asked her to take a sample of defendant's blood (R. 228:186). Trooper Kevin Davis later testified at the preliminary hearing that defendant was unconscious when Joanne drew his blood (R. 226:32). Trooper Hinton testified at trial that defendant was unconscious when Joanne drew his blood (R. 228:191). Joanne testified at trial that defendant was awake and conscious when she drew his blood and that she could not remember whether Trooper Hinton had asked defendant for consent to draw his blood (229:243–44). She later corrected herself, however, and testified that she could not remember if defendant was conscious when she drew his blood (R. 229:245). She just remembered defendant "moaning and a few things like that" (R. 229:245).

SUMMARY OF ARGUMENT

Defendant asserts his trial counsel was ineffective for not moving to suppress the evidence of the blood-alcohol test and for not moving to merge the driving under the influence ("DUI") conviction into the automobile homicide convictions. To prove ineffectiveness, defendant must demonstrate both that his counsel rendered deficient performance and that his counsel's performance prejudiced him. Defendant bears the burden

of ensuring that the record on appeal is adequate to demonstrate ineffectiveness. Record deficiencies are construed in favor of finding that counsel was effective.

The record is insufficient to review defendant's claim that his counsel should have filed a motion to suppress. Defendant asserts that the State could not have proved exigent circumstances to justify the warrantless blood draw. The record, however, is devoid of any evidence of whether the State could have proved exigency. Defendant never asked for a rule 23B remand to supplement the record with evidence demonstrating a lack of exigency. This Court must therefore assume that there exists evidence to support exigency and that defense counsel was therefore effective.

In any event, counsel's decision not to file a motion to suppress the blood-alcohol test did not constitute ineffective assistance because counsel had no reason to believe that such a motion would succeed. It is well established that under Utah's implied consent law an unconscious person is considered not to have withdrawn his consent to a chemical test. Officers at both the preliminary hearing and the trial testified that defendant was unconscious when the nurse drew his blood. Therefore, defendant's blood draw was consensual, and a motion to suppress would have been futile.

Counsel was also not ineffective for not asking the court to merge defendant's convictions for DUI and automobile homicide. Automobile homicide is an enhancement statute, and the legislature therefore intended that intoxicated drivers who cause the death of another by criminal negligence be punished for both impaired driving and automobile homicide.

ARGUMENT

DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE BECAUSE THE MOTIONS DEFENDANT CLAIMS HIS COUNSEL SHOULD HAVE MADE WOULD HAVE BEEN FUTILE

Defendant asserts that he received ineffective assistance of counsel because his trial counsel did not move to suppress evidence of his blood-alcohol level and did not move to merge his conviction for driving under the influence ("DUI") with his convictions for automobile homicide. *See* Br. Aplt. at 13.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). To establish that he did not receive the representation guaranteed by the Sixth Amendment, defendant must prove two elements. First, he must identify the specific acts or omissions he claims fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88, 690 (1984); *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994). Second "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Failure to raise futile objections does not constitute ineffective assistance of counsel." *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546.

Defendant also has the burden of assuring an adequate record on appeal. *See State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92. Defendant may not rely on speculation to support allegations of ineffective assistance, but must prove that the ineffective assistance is a "demonstrable reality." *Parsons*, 871 P.2d at 526 (quoting *Fernandez v. Cook*, 870 P.2d

870, 877 (Utah 1993)). "[W]here the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Litherland*, 2000 UT 76, ¶ 17.

A. The record on appeal is insufficient to review defendant's claim that his counsel should have filed a motion to suppress.

Defendant asserts that the trial court would have granted a motion to suppress evidence obtained from the warrantless blood draw because "[t]he State could not have met its burden of showing exigent circumstances." *See* Br. Aplt. at 19.

As a threshold matter, the record is insufficient to demonstrate that the State could not have proven exigent circumstances. This Court has held that the dissipation of alcohol, without more, is not an exigency that excuses officers from seeking a warrant. *See State v. Rodriguez*, 2004 UT App 198, ¶ 14, 93 P.3d 854, *cert. granted by* 100 P.3d 220 (Utah). Instead, this Court requires the State to demonstrate exigency by satisfying a list of factors from *City of Orem v. Henrie*, 868 P.2d 1384, 1392 (Utah App. 1994). Those factors include the distance to the nearest magistrate, the availability of a telephonic warrant, the feasibility of a stake-out or other form of surveillance, the seriousness of the underlying alcohol-related offense, the commission of another offense such as fleeing the scene of an accident, the ongoing and continuing nature of the investigation, the extent of probable cause, and the conduct of the investigating officers. *See Rodriguez*, 2004 UT App 198, ¶ 16.

Defendant's assertion that there is no evidence from which the State could prove exigency is wholly speculative and improperly shifts the burden to provide an adequate record on appeal to the State. The record deficiencies are not the result of the State being

unable to produce evidence of exigency. Rather, they are the result of defense counsel's decision not to seek suppression of the blood draw. Defendant never asked the State to prove exigency. He now claims that there is no evidence supporting exigency, yet nothing in the record demonstrates that the State could not have provided such evidence had defendant filed a motion to suppress. Moreover, when he decided on appeal to accuse his trial counsel of ineffectiveness, he never tried to supplement the record through a rule 23B remand. Accordingly, this Court must assume that had defendant asked the State to show exigency, at trial or on a rule 23B remand, the State would have provided sufficient evidence of exigency to excuse officers from seeking a warrant. *See Litherland*, 2000 UT 76, ¶ 17 ("Where the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.").

In any event, the State would not have had to establish exigent circumstances, because, as trial counsel undoubtedly realized, defendant was unconscious when police drew his blood, and an unconscious person is deemed not to have revoked the consent created by Utah's implied consent statute.

B. The trial court would not have granted a motion to suppress because defendant was deemed to have consented to the blood draw by Utah's implied consent statute.

A blood draw is a search under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 767 (1966). As such, police may only draw a suspect's blood if they have probable cause and a warrant or an exception to the warrant requirement. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Schmerber*, 384 U.S. at 768–70. One well-recognized exception to

the warrant requirement is for searches pursuant to consent. *See Washington v. Chrisman*, 455 U.S. 1, 9–10 (1982); *State v. Bisner*, 2001 UT 99, ¶ 43, 37 P.3d 1073.

The Utah Legislature has decided that those who enjoy the privilege of driving on Utah's roads must also consent to a chemical test if they are found driving under the influence of drugs or alcohol. "A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine," if the investigating officer has probable cause to believe the person is guilty of DUI. Utah Code Ann. § 41-6-44.10(1)(a) (Supp. 2002). If a person refuses to submit to a chemical test, the Driver's License Division may immediately revoke their license. *See* Utah Code Ann. § 41-6-44.10(2). However, "[a]ny person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent." Utah Code Ann. § 76-6-44.10(3). Accordingly, "the test or tests may be administered whether the person has been arrested or not." *Id.*

This Court upheld a warrantless blood draw on an unconscious suspect under the implied consent statute in *State v. Wight*, 765 P.2d 12, 15–16 (Utah App. 1988). Wight was the driver in a two-car accident in which the other driver was killed. *Id.* at 14. He was taken to the hospital where a highway patrolman observed that Wight was unconscious and had alcohol on his breath. *Id.* The highway patrolman ordered a blood draw, which revealed that Wight's blood-alcohol level was .20 percent, more than twice the legal limit. *Id.* A jury subsequently convicted Wight of automobile homicide. *Id.*

On appeal, Wight asserted that his trial counsel was ineffective for failing to move to suppress the blood sample. *Id.* at 15–16. This Court disagreed and held that objecting to the

evidence would have been futile because Utah Code Ann. §41-6-44.10 "allows drawing blood from an unconscious person." *Id.* at 16; *see also In re K.K.H.*, 610 P.2d 849, 853 (Utah 1980) (holding that implied consent statute makes actual consent unnecessary if suspect is incapable of consenting or refusing).

Other states with similar implied consent statutes have also allowed blood draws based on an unconscious suspect's implied consent. *See e.g. Smith v. State*, 460 So.2d 343, 346 (Ala. Crim. App. 1984); *Bush v. Bright*, 71 Cal.Rptr. 123, 124–25 (Cal. Ct. App. 1968); *Morrow v. State*, 303 A.2d 633, 635 (Del. 1973); *State v. Tronolone*, 532 So.2d 1127, 1128 (Fla. Dist. Ct. App. 1988); *Holmes v. State*, 350 S.E.2d 497, 498 (Ga. Ct. App. 1986); *People v. Polk*, 451 N.E.2d 579, 579–80 (Ill. App. Ct. 1983); *State v. Campbell*, 615 P.2d 190, 197 (Mont. 1980); *State v. Wyrostek*, 767 P.2d 379, 380–81 (N.M. Ct. App. 1988); *People v. Dombrowski-Bove*, 753 N.Y.S.2d 259, 260–61 (N.Y. App. Div. 2002); *see also* Patricia Jean Lamkin, Annotation, *Admissibility in Criminal Case of Blood Alcohol Test where Blood was Taken from Unconscious Driver*, 72 A.L.R.3d 325 § 9 (1976) (listing cases in which courts have upheld admissibility of blood draw taken from unconscious suspect pursuant to implied consent law).

In the instant case, defendant does not dispute that Trooper Hinton had probable cause to believe that he was guilty of driving under the influence and that a sample of his blood would provide evidence of his crime. Defendant claims only that "the State could not have met its burden of establishing exigent circumstances sufficient to overcome the need for a warrant." Br. Aplt. at 19. The State would not have needed to establish exigent circumstances, however, because defendant consented to a blood draw by driving his pickup

in Utah. *See* Utah Code Ann. § 41-6-44.10(1)(a). That consent remained in force at the time Joanne Nielson drew defendant's blood because defendant was unconscious and unable to refuse the test. *See* Utah Code Ann. § 41-6-44.10(3) ("Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1) . . . .").

In light of the testimony from officers at both the preliminary hearing and at trial that defendant was unconscious when his blood was drawn, trial counsel was not ineffective for deciding not to file a motion to withdraw. The only testimony that defendant was awake when his blood was drawn came from Joanne Nielson on the second day of trial (R. 229:243). But, Joanne almost immediately retracted her testimony and stated that she could not remember whether defendant was conscious when she drew his blood (R. 229:245). There being no evidence that defendant was capable of refusing consent to draw his blood, trial counsel was not ineffective for deciding not to file a motion to suppress.[1]

In any event, exigent circumstances did exist because *Rodriguez* was wrongly decided—the dissipation of blood-alcohol evidence, without more, is an exigency. This is holding of the U.S. Supreme Court. *See Schmerber v. California*, 384 U.S. 757, 770–71

[1] To the extent that Joanne's testimony creates a factual question as to whether defendant was unconscious when she drew his blood, the burden is defendant's to resolve the factual question before asserting his claim. *See Litherland*, 2000 UT 76, ¶ 17 ("[W]here the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively."). Defendant has not asked for a rule 23B remand. This Court should therefore construe the record as establishing that defendant was unconscious when his blood was drawn. *See id.*

(1966). It is also the holding of the majority of jurisdictions to consider the issue. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1204–05 (9th Cir. 1998); *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991); *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989); *State v. Cocio*, 709 P.2d 1336, 1345 (Ariz. 1985); *People v. Clark*, 857 P.2d 1099, 1125 (Cal. 1993) (in bank); *People v. Sugarman*, 116 Cal.Rptr.2d 689, 692 (Cal. Ct. App. 2002); *State v. Taylor*, 531 A.2d 157, 160–161 (Conn. App. Ct. 1987); *State v. McGarry*, 477 So.2d 1030, 1031–32 (Fla. Dist. Ct. App. 1985); *State v. Entrekin*, 47 P.3d 336, 348 (Haw. 2002); *State v. Cooper*, 39 P.3d 637, 640–41 (Idaho Ct. App. 2002); *State v. Murry*, 21 P.3d 528, 534–35 (Kan. 2001); *State v. Baker*, 502 A.2d 489, 493 (Me. 1985); *People v. Morris*, 242 N.W.2d 47, 49 (Mich. Ct. App. 1976), *vacated on other grounds*, 245 N.W.2d 544 (Mich. 1976); *State v. Oevering*, 268 N.W.2d 68, 74 (Minn. 1978); *State v. Lerette*, 858 S.W.2d 816, 818–19 (Mo. App. Ct. 1993); *Galvan v. State*, 655 P.2d 155, 157 (Nev. 1982); *State v. Ravotto*, 777 A.2d 301, 315 (N.J. 2001); *Wilhelmi v. Dir. of Dep't of Transp.*, 498 N.W.2d 150, 155 (N.D. 1993); *State v. Milligan*, 748 P.2d 130, 134 (Or. 1988) (en banc); *State v. Engesser*, 661 N.W.2d 739, 748 (S.D. 2003); *Aliff v. State*, 627 S.W.2d 166, 169–170 (Tex. Crim. App. 1982); *Tipton v. Commonwealth*, 444 S.E.2d 1, 3 (Va. Ct. App. 1994); *State v. Baldwin*, 37 P.3d 1220, 1224–25 (Wash. Ct. App. 2001); *State v. Bohling*, 494 N.W.2d 399, 402–07 (Wis. 1993), *cert. denied*, 510 U.S. 836 (1993). Thus, even under an exigent circumstances analysis, defendant's blood draw did not violate the Fourth Amendment. The Utah Supreme Court has granted the State's certiorari petition in *Rodriguez* to review this issue. *See State v. Rodriguez*, 100 P.3d 220 (Utah 2004).

Thus, defendant's claim fails.

C. The legislature did not intend that a conviction for driving under the influence of alcohol should merge into a conviction for automobile homicide.

Defendant next asserts that his counsel was ineffective for failing to ask the court to merge his DUI conviction with his automobile homicide convictions. *See* Br. Aplt. at 20. He claims that counsel's failure subjected him to double jeopardy in violation of the Utah and United States Constitutions. *See* Br. Aplt. at 20–21.[2]

The Double Jeopardy Clause of the Fifth Amendment provides three protections. *See Ohio v. Johnson*, 467 U.S. 493, 497–98 (1984). It protects against a second prosecution for the same offense after an acquittal; it protects against a second prosecution for the same offense after a conviction; and it protects against multiple punishments for the same offense. *Id.* at 498. Defendant's claim implicates the third protection—multiple punishments for the same offense.

The protection against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Id.* at 499. "[T]he substantive power to prescribe crimes and determine punishments is vested with the legislature," so that "the question under the Double Jeopardy clause whether punishments are 'multiple' is essentially one of legislative intent." *Id.* (citations omitted); *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990) ("Resolution of the issue requires a determination of

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[2] Defendant has not briefed a separate Utah Constitution claim. Thus, this Court should review his claim only under the jurisprudence of the Fifth Amendment to the United States Constitution. *See Brigham City v. Stuart*, 2005 UT 13, ¶ 14, 2005 WL 387966 (noting that court is "resolute in [its] refusal to take up constitutional issues which have not been properly preserved, framed and briefed").

whether the legislature intended aggravated robbery to be a lesser included offense of second degree felony murder.").

The question of whether a defendant has been punished multiple times for the same offense is usually resolved by determining whether one of the offenses is a lesser-included offense of the other. *See* Utah Code Ann. § 76-1-402 (West 2004); *State v. Hill*, 674 P.2d 96, 97 (Utah 1983). "A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." Utah Code Ann. § 76-1-402(3). "An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged . . . ." *Id.* "Thus, where the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' . . . then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." *Hill*, 674 P.2d at 97 (quoting *State v. Baker*, 671 P.2d 152, 156 (Utah 1983)).

Courts do not, however, always rely blindly on theoretical comparisons of statutory elements to divine the ultimate question of legislative intent. In *State v. McCovey*, the Utah Supreme Court held, "Despite the fact that under the *Hill* analysis aggravated robbery would be a lesser included offense of felony murder, we recognize that enhancement statutes are different in nature than other criminal statutes." 803 P.2d at 1237. McCovey was convicted of aggravated robbery and felony-murder for his participation in a video store robbery in which a customer was fatally shot. *Id.* at 1234. He asserted that aggravated robbery was a lesser included offense of felony-murder under *Hill* because felony murder required the State

to prove all the elements of aggravated robbery plus that defendant caused the death of another during the commission of the robbery. *Id.* at 1235. In other words, the State could only prove felony murder by first proving that defendant committed aggravated robbery.

After noting that aggravated robbery was a lesser-included offense of felony murder under the *Hill* test, and that enhancement statutes were different from other lesser-included offenses, the *McCovey* court examined the traditional purpose of felony murder. *See id.* at 1237. It determined that "the Utah State Legislature did not intend the multiple crimes of felony murder to be punished as a single crime, but rather, that the homicide be enhanced to second degree felony murder in addition to the underlying felony." *Id.* at 1239. Thus, even though aggravated robbery was a lesser-included offense of felony murder under the *Hill* test, the Utah Supreme Court looked beyond *Hill* to the legislature's actual intent and held that *McCovey* could be convicted of aggravated robbery and felony murder even where aggravated robbery was the predicate offense for felony murder. *See McCovey*, 803 P.2d at 1239.

This Court followed *McCovey* in *State v. Smith* to hold that aggravated assault did not merge with second-degree use of a concealed weapon because the concealed weapon statute "is most properly characterized as an enhancement statute to which the legislature did not intend merger to apply." *State v. Smith*, 2003 UT App 52, ¶ 22, 65 P.3d 648, *cert. granted*, 76 P.3d 691. The Court noted that "[t]he penalties imposed by [the concealed weapon statute] increase proportionally to the increased risk to the public, and this graduated punishment scale is indicative of an enhancement statute." *Id.*

At first glance, DUI appears to be a lesser-included offense of automobile homicide under the *Hill* analysis. Both statutes require the State to show that the defendant operated a vehicle with a blood alcohol level of .08 percent or greater or under the influence of drugs or alcohol to a degree that rendered him incapable of safely operating a vehicle. *Compare* Utah Code Ann. § 41-6-44; Utah Code Ann. § 76-5-207. Automobile homicide then has the additional elements of causing the death of another by operating a motor vehicle in a negligent or criminally negligent manner. *See* Utah Code Ann. § 76-5-207. Thus, under *Hill*, a DUI conviction is a lesser included offense of automobile homicide.

A closer examination, however, reveals that, like felony murder in *McCovey* and felony concealed weapon possession in *Smith*, automobile homicide is an enhancement offense. It raises a Class A negligent homicide to a second degree felony when the crime involves a vehicle and the actor is under the influence of alcohol. *Compare* Utah Code Ann. § 76-5-206 (West 2004). Like felony murder, *see* Utah Code Ann. §76-5-203(d) (West 2004), the automobile homicide statute "automatically enhances the degree of the offense and punishment without the necessity of considering [an additional] *mens rea* or mental state." *McCovey*, 803 P.2d at 1238. "Were it not for the [automobile homicide] statute, an accidental, negligent, or reckless homicide . . . would only be punishable as . . . negligent homicide, a class A misdemeanor." *McCovey*, 803 P.2d at 1238.

Moreover, DUI and automobile homicide serve different purposes and punish distinct acts. DUI is a traffic offense found in Chapter 6 of Title 41, Traffic Rules and Regulations. Its purpose is to increase road safety by prohibiting intoxicated persons from driving on Utah's roads. It punishes the act of driving while impaired, without any showing of *mens*

rea. Automobile homicide, conversely, is an offense against the person found in the homicide section of Title 76, the Criminal Code. It punishes causing the death of another by negligent operation of an automobile while driving under the influence. Thus, unlike DUI, automobile homicide requires a *mens rea* of criminal negligence.

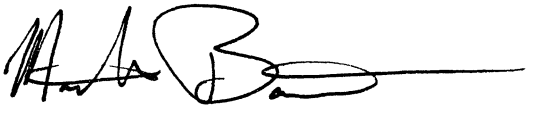
In other words, the two crimes share a common element—operating a vehicle under the influence of alcohol—but otherwise punish different acts for different purposes. It is likely, therefore, that the legislature intended that a person, like defendant, who kills another while driving under the influence be punished both for automobile homicide and for driving under the influence. The crimes do not merge, and defense counsel was not, therefore, ineffective for failing to request merger.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 4th of March 2005.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL



MATTHEW D. BATES
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Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 4th of March 2005, I served four copies of the foregoing Brief of Appellee upon the defendant/appellant, Daniel Perez-Avila, by causing them to be delivered by first class mail to his counsel of record as follows:

Margaret P. Lindsay
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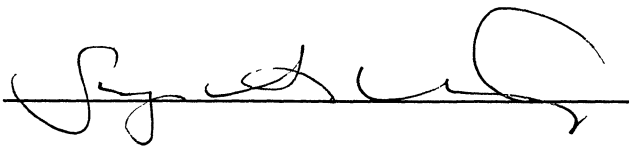

Addendum

41-6-44. Driving under the influence of alcohol, drugs, or a combination of both or with specified or unsafe blood alcohol concentration — Measurement of blood or breath alcohol — Criminal punishment — Arrest without warrant — Penalties — Suspension or revocation of license.

(1) As used in this section:

(a) "conviction" means any conviction for a violation of:

(i) this section;

(ii) alcohol, any drug, or a combination of both-related reckless driving under Subsections (9) and (10);

(iii) Section 41-6-44.6, driving with any measurable controlled substance that is taken illegally in the body;

(iv) local ordinances similar to this section or alcohol, any drug, or a combination of both-related reckless driving adopted in compliance with Section 41-6-43;

(v) automobile homicide under Section 76-5-207; or

(vi) a violation described in Subsections (1)(a)(i) through (v), which judgment of conviction is reduced under Section 76-3-402; or

(vii) statutes or ordinances in effect in any other state, the United States, or any district, possession, or territory of the United States which would constitute a violation of this section or alcohol, any drug, or a combination of both-related reckless driving if committed in this state, including punishments administered under 10 U.S.C. Sec. 815;

(b) "educational series" means an educational series obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(c) "screening and assessment" means a substance abuse addiction and dependency screening and assessment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(d) "serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death;

(e) "substance abuse treatment" means treatment obtained at a substance abuse program that is approved by the Board of Substance Abuse in accordance with Section 62A-8-107;

(f) "substance abuse treatment program" means a state licensed substance abuse program;

(g) a violation of this section includes a violation under a local ordinance similar to this section adopted in compliance with Section 41-6-43; and

(h) the standard of negligence is that of simple negligence, the failure to exercise that degree of care that an ordinarily reasonable and prudent person exercises under like or similar circumstances.

(2) (a) A person may not operate or be in actual physical control of a vehicle within this state if the person:

(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control.

(b) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense against any charge of violating this section.

(c) Alcohol concentration in the blood shall be based upon grams of alcohol per 100 milliliters of blood, and alcohol concentration in the breath shall be based upon grams of alcohol per 210 liters of breath.

(3) (a) A person convicted the first or second time of a violation of Subsection (2) is guilty of a:

(i) class B misdemeanor; or

(ii) class A misdemeanor if the person:

(A) has also inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner;

(B) had a passenger under 16 years of age in the vehicle at the time of the offense; or

(C) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense.

(b) A person convicted of a violation of Subsection (2) is guilty of a third degree felony if the person has also inflicted serious bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner.

(4) (a) As part of any sentence imposed the court shall, upon a first conviction, impose a mandatory jail sentence of not less than 48 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 48 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (4)(d); and

(iii) impose a fine of not less than $700.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) (i) Except as provided in Subsection (4)(e)(ii), the court may order probation for the person in accordance with Subsection (14).

(ii) If there is admissible evidence that the person had a blood alcohol level of .16 or higher, the court shall order probation for the person in accordance with Subsection (14).

(5) (a) If a person is convicted under Subsection (2) within ten years of a prior conviction under this section, the court shall as part of any sentence impose a mandatory jail sentence of not less than 240 consecutive hours.

(b) The court may, as an alternative to all or part of a jail sentence, require the person to:

(i) work in a compensatory-service work program for not less than 240 hours; or

(ii) participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(c) In addition to the jail sentence, compensatory-service work program, or home confinement, the court shall:

(i) order the person to participate in a screening and assessment;

(ii) order the person to participate in an educational series if the court does not order substance abuse treatment as described under Subsection (5)(d); and

(iii) impose a fine of not less than $800.

(d) The court may order the person to obtain substance abuse treatment if the substance abuse treatment program determines that substance abuse treatment is appropriate.

(e) The court shall order probation for the person in accordance with Subsection (14).

(6) (a) A conviction for a violation of Subsection (2) is a third degree felony if it is:

(i) a third or subsequent conviction under this section within ten years of two or more prior convictions; or

(ii) at any time after a conviction of:

(A) automobile homicide under Section 76-5-207 that is committed after July 1, 2001; or

(B) a felony violation under this section that is committed after July 1, 2001.

(b) Any conviction described in this Subsection (6) which judgment of conviction is reduced under Section 76-3-402 is a conviction for purposes of this section.

(c) Under Subsection (3)(b) or (6)(a), if the court suspends the execution of a prison sentence and places the defendant on probation the court shall impose:

(i) a fine of not less than $1,500; and

(ii) a mandatory jail sentence of not less than 1,500 hours.

(d) For Subsection (6)(a) or (c), the court shall impose an order requiring the person to obtain a screening and assessment and substance abuse treatment at a substance abuse treatment program providing intensive care or inpatient treatment and long-term closely supervised follow-through after treatment for not less than 240 hours.

(e) In addition to the penalties required under Subsection (6)(c), if the court orders probation, the probation shall be supervised probation which may include requiring the person to participate in home confinement through the use of electronic monitoring in accordance with Subsection (13).

(7) The mandatory portion of any sentence required under this section may not be suspended and the convicted person is not eligible for parole or probation until any sentence imposed under this section has been served. Probation or parole resulting from a conviction for a violation under this section may not be terminated.

(8) (a) (i) The provisions in Subsections (4), (5), and (6) that require a sentencing court to order a convicted person to: participate in a screening and assessment; and an educational series; obtain, in the

discretion of the court, substance abuse treatment; obtain, mandatorily, substance abuse treatment; or do a combination of those things, apply to a conviction for a violation of Section 41-6-44.6 or 41-6-45 under Subsection (9).

(ii) The court shall render the same order regarding screening and assessment, an educational series, or substance abuse treatment in connection with a first, second, or subsequent conviction under Section 41-6-44.6 or 41-6-45 under Subsection (9), as the court would render in connection with applying respectively, the first, second, or subsequent conviction requirements of Subsections (4), (5), and (6).

(b) The court shall notify the Driver License Division if a person fails to:

(i) complete all court ordered:

(A) screening and assessment;

(B) educational series;

(C) substance abuse treatment; and

(D) hours of work in compensatory-service work program; or

(ii) pay all fines and fees, including fees for restitution and treatment costs. Upon receiving the notification, the division shall suspend the person's driving privilege in accordance with Subsections 53-3-221(2) and (3).

(9) (a) (i) When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 41-6-45, of an ordinance enacted under Section 41-6-43, or of Section 41-6-44.6 in satisfaction of, or as a substitute for, an original charge of a violation of this section, the prosecution shall state for the record a factual basis for the plea, including whether or not there had been consumption of alcohol, drugs, or a combination of both, by the defendant in connection with the violation.

(ii) The statement is an offer of proof of the facts that shows whether there was consumption of alcohol, drugs, or a combination of both, by the defendant, in connection with the violation.

(b) The court shall advise the defendant before accepting the plea offered under this Subsection (9)(b) of the consequences of a violation of Section 41-6-44.6 or of Section 41-6-45.

(c) The court shall notify the Driver License Division of each conviction of Section 41-6-44.6 or 41-6-45 entered under this Subsection (9).

(10) A peace officer may, without a warrant, arrest a person for a violation of this section when the officer has probable cause to believe the violation has occurred, although not in his presence, and if the officer has probable cause to believe that the violation was committed by the person.

(11) (a) The Driver License Division shall:

(i) suspend for 90 days the operator's license of a person convicted for the first time under Subsection (2);

(ii) revoke for one year the license of a person convicted of any subsequent offense under Subsection (2) or if the person has a prior conviction as defined under Subsection (1) if the violation is committed within a period of ten years from the date of the prior violation; and

(iii) suspend or revoke the license of a person as ordered by the court under Subsection (12).

(b) The Driver License Division shall subtract from any suspension or revocation period the number of days for which a license was previously suspended under Section 53-3-223 or 53-3-231, if the previous suspension

was based on the same occurrence upon which the record of conviction is based.

(12) (a) In addition to any other penalties provided in this section, a court may order the operator's license of a person who is convicted of a violation of Subsection (2) to be suspended or revoked for an additional period of 90 days, 180 days, one year, or two years to remove from the highways those persons who have shown they are safety hazards.

(b) If the court suspends or revokes the person's license under this Subsection (12)(b), the court shall prepare and send to the Driver License Division an order to suspend or revoke that person's driving privileges for a specified period of time.

(13) (a) If the court orders a person to participate in home confinement through the use of electronic monitoring, the electronic monitoring shall alert the appropriate corrections, probation monitoring agency, law enforcement units, or contract provider of the defendant's whereabouts.

(b) The electronic monitoring device shall be used under conditions which require:

(i) the person to wear an electronic monitoring device at all times;

(ii) that a device be placed in the home or other specified location of the person, so that the person's compliance with the court's order may be monitored; and

(iii) the person to pay the costs of the electronic monitoring.

(c) The court shall order the appropriate entity described in Subsection (13)(e) to place an electronic monitoring device on the person and install electronic monitoring equipment in the residence of the person or other specified location.

(d) The court may:

(i) require the person's electronic home monitoring device to include a substance abuse testing instrument;

(ii) restrict the amount of alcohol the person may consume during the time the person is subject to home confinement;

(iii) set specific time and location conditions that allow the person to attend school educational classes, or employment and to travel directly between those activities and the person's home; and

(iv) waive all or part of the costs associated with home confinement if the person is determined to be indigent by the court.

(e) The electronic monitoring described in this section may either be administered directly by the appropriate corrections agency, probation monitoring agency, or by contract with a private provider.

(f) The electronic monitoring provider shall cover the costs of waivers by the court under Subsection (13)(c)(iv).

(14) (a) If supervised probation is ordered under Section 41-6-44.6 or Subsection (4)(e) or (5)(e):

(i) the court shall specify the period of the probation;

(ii) the person shall pay all of the costs of the probation; and

(iii) the court may order any other conditions of the probation.

(b) The court shall provide the probation described in this section by contract with a probation monitoring agency or a private probation provider.

(c) The probation provider described in Subsection (14)(b) shall monitor the person's compliance with all conditions of the person's sentence, conditions of probation, and court orders received under this article and shall notify the court of any failure to comply with or complete that sentence or those conditions or orders.

(d) (i) The court may waive all or part of the costs associated with probation if the person is determined to be indigent by the court.

(ii) The probation provider described in Subsection (14)(b) shall cover the costs of waivers by the court under Subsection (14)(d)(i).

(15) If a person is convicted of a violation of Subsection (2) and there is admissible evidence that the person had a blood alcohol level of .16 or higher, then if the court does not order:

(a) treatment as described under Subsection (4)(d), (5)(d), or (6)(d), then the court shall enter the reasons on the record; and

(b) the following penalties, the court shall enter the reasons on the record:

(i) the installation of an ignition interlock system as a condition of probation for the person in accordance with Section 41-6-44.7; or

(ii) the imposition of home confinement through the use of electronic monitoring in accordance with Subsection (13).

41-6-44.10. Implied consent to chemical tests for alcohol or drug — Number of tests — Refusal — Warning, report — Hearing, revocation of license — Appeal — Person incapable of refusal — Results of test available — Who may give test — Evidence.

(1) (a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6.

(b) (i) The peace officer determines which of the tests are administered and how many of them are administered.

(ii) If an officer requests more than one test, refusal by a person to take one or more requested tests, even though he does submit to any other requested test or tests, is a refusal under this section.

(c) (i) A person who has been requested under this section to submit to a chemical test or tests of his breath, blood, or urine, may not select the test or tests to be administered.

(ii) The failure or inability of a peace officer to arrange for any specific chemical test is not a defense to taking a test requested by a peace officer, and it is not a defense in any criminal, civil, or administrative proceeding resulting from a person's refusal to submit to the requested test or tests.

(2) (a) If the person has been placed under arrest, has then been requested by a peace officer to submit to any one or more of the chemical tests under Subsection (1), and refuses to submit to any chemical test requested, the person shall be warned by the peace officer requesting the test or tests that a refusal to submit to the test or tests can result in revocation of the person's license to operate a motor vehicle.

(b) Following the warning under Subsection (2)(a), if the person does not immediately request that the chemical test or tests as offered by a peace officer be administered a peace officer shall serve on the person, on behalf of the Driver License Division, immediate notice of the Driver License Division's intention to revoke the person's privilege or license to operate a motor vehicle. When the officer serves the immediate notice on behalf of the Driver License Division, he shall:

(i) take the Utah license certificate or permit, if any, of the operator;

(ii) issue a temporary license effective for only 29 days; and

(iii) supply to the operator, on a form approved by the Driver License Division, basic information regarding how to obtain a hearing before the Driver License Division.

(c) A citation issued by a peace officer may, if approved as to form by the Driver License Division, serve also as the temporary license.

(d) As a matter of procedure, the peace officer shall submit a signed report, within ten calendar days after the date of the arrest, that he had grounds to believe the arrested person had been operating or was in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited under Section 41-6-44, 53-3-231, or 53-3-232, or while under the influence of alcohol, any drug, or combination of alcohol and any drug under Section 41-6-44, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body in violation of Section 41-6-44.6, and that the person had refused to submit to a chemical test or tests under Subsection (1).

(e) (i) A person who has been notified of the Driver License Division's intention to revoke his license under this section is entitled to a hearing.

(ii) A request for the hearing shall be made in writing within ten calendar days after the date of the arrest.

(iii) Upon written request, the division shall grant to the person an opportunity to be heard within 29 days after the date of arrest.

(iv) If the person does not make a timely written request for a hearing before the division, his privilege to operate a motor vehicle in the state is revoked beginning on the 30th day after the date of arrest for a period of:

(A) 18 months unless Subsection (2)(e)(iv)(B) applies; or

(B) 24 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 41-6-44.6, 53-3-223, 53-3-231, 53-3-232, or a conviction after July 1, 1993, under Section 41-6-44.

(f) If a hearing is requested by the person, the hearing shall be conducted by the Driver License Division in the county in which the offense occurred, unless the division and the person both agree that the hearing may be held in some other county.

(g) The hearing shall be documented and shall cover the issues of:

(i) whether a peace officer had reasonable grounds to believe that a person was operating a motor vehicle in violation of Section 41-6-44, 41-6-44.6, or 53-3-231; and

(ii) whether the person refused to submit to the test.

(h) (i) In connection with the hearing, the division or its authorized agent:

(A) may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers; and

(B) shall issue subpoenas for the attendance of necessary peace officers.

(ii) The division shall pay witness fees and mileage from the Transportation Fund in accordance with the rates established in Section 78-46-28.

(i) If after a hearing, the Driver License Division determines that the person was requested to submit to a chemical test or tests and refused to

submit to the test or tests, or if the person fails to appear before the Driver License Division as required in the notice, the Driver License Division shall revoke his license or permit to operate a motor vehicle in Utah beginning on the date the hearing is held for a period of:

(i) (A) 18 months unless Subsection (2)(i)(i)(B) applies; or

(B) 24 months if the person has had a previous license sanction after July 1, 1993, under this section, Section 41-6-44.6, 53-3-223, 53-3-231, 53-3-232, or a conviction after July 1, 1993, under Section 41-6-44.

(ii) The Driver License Division shall also assess against the person, in addition to any fee imposed under Subsection 53-3-205(13), a fee under Section 53-3-105, which shall be paid before the person's driving privilege is reinstated, to cover administrative costs.

(iii) The fee shall be cancelled if the person obtains an unappealed court decision following a proceeding allowed under this Subsection (2) that the revocation was improper.

(j) (i) Any person whose license has been revoked by the Driver License Division under this section may seek judicial review.

(ii) Judicial review of an informal adjudicative proceeding is a trial. Venue is in the district court in the county in which the offense occurred.

(3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to not have withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.

(4) Upon the request of the person who was tested, the results of the test or tests shall be made available to him.

(5) (a) Only a physician, registered nurse, practical nurse, or person authorized under Section 26-1-30, acting at the request of a peace officer, may withdraw blood to determine the alcoholic or drug content. This limitation does not apply to taking a urine or breath specimen.

(b) Any physician, registered nurse, practical nurse, or person authorized under Section 26-1-30 who, at the direction of a peace officer, draws a sample of blood from any person whom a peace officer has reason to believe is driving in violation of this chapter, or hospital or medical facility at which the sample is drawn, is immune from any civil or criminal liability arising from drawing the sample, if the test is administered according to standard medical practice.

(6) (a) The person to be tested may, at his own expense, have a physician of his own choice administer a chemical test in addition to the test or tests administered at the direction of a peace officer.

(b) The failure or inability to obtain the additional test does not affect admissibility of the results of the test or tests taken at the direction of a peace officer, or preclude or delay the test or tests to be taken at the direction of a peace officer.

(c) The additional test shall be subsequent to the test or tests administered at the direction of a peace officer.

(7) For the purpose of determining whether to submit to a chemical test or tests, the person to be tested does not have the right to consult an attorney or have an attorney, physician, or other person present as a condition for the taking of any test.

(8) If a person under arrest refuses to submit to a chemical test or tests or any additional test under this section, evidence of any refusal is admissible in

any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person was operating or in actual physical control of a motor vehicle while under the influence of alcohol, any drug, combination of alcohol and any drug, or while having any measurable controlled substance or metabolite of a controlled substance in the person's body.

§ 76-1-402. Separate offenses arising out of single criminal episode—Included offenses

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court; and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

§ 76–5–206. Negligent homicide

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent homicide is a class A misdemeanor.

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the person operates a motor vehicle in a negligent manner causing the death of another and:

(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the person operates a motor vehicle in a criminally negligent manner causing the death of another and:

(i) has sufficient alcohol in his body that a subsequent chemical test shows that the person has a blood or breath alcohol concentration of .08 grams or greater at the time of the test;

(ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle; or

(iii) has a blood or breath alcohol concentration of .08 grams or greater at the time of operation.

(b) For the purpose of this section, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) Calculations of blood or breath alcohol concentration under this section shall be made in accordance with Subsection 41-6-44(2).

(5) The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(7) For purposes of this section, "motor vehicle" means any self-propelled vehicle and includes any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.